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IN THE

# Supreme Court of the United States

**OCTOBER TERM 1954**

**No. 123**

W. LUNSFORD LONG and HEWITT S. WEST,

*Petitioners,*

—against—

HONORABLE SYLVESTER J. RYAN and THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners W. Lunsford Long and Hewitt S. West respectfully request this Honorable Court to issue a writ of certiorari to review the decision and order of the United States Court of Appeals for the Second Circuit, which denied their petition for a writ of prohibition or mandamus to Honorable Sylvester J. Ryan and the Honorable Judges of the United States District Court for the Southern District of New York to forbid the District Court from

further entertaining jurisdiction over and directing it to dismiss for lack of jurisdiction of the subject matter, the action now pending there against your petitioners, entitled:

> "LEWIS H. SAPER, as Trustee in Bankruptcy of the ESTATE OF RIVERSIDE IRON AND STEEL CORPORATION, BANKRUPT, Plaintiff, vs. W. LUNSFORD LONG and HEWITT S. WEST, Defendants." (Docket No. Civil 81-1)

The lack of jurisdiction appears because the Trustee's appointment, made in a voluntary bankruptcy proceeding over which the District Court had no jurisdiction, is null and void. The alleged Trustee, therefore, has no right of action against your petitioners to set aside alleged transfers of the bankrupt's property under the Bankruptcy Act, which also confers jurisdiction on the federal courts to hear such claims of a Bankruptcy Trustee.

The writs were sought upon the ground that the District Court, by continuing to entertain said action, has clearly exceeded its jurisdiction, in that:

> (1) The plaintiff, Lewis H. Saper, as alleged Trustee in Bankruptcy of Riverside Iron and Steel Corporation (hereinafter called "Riverside"), has no right or capacity to maintain that action against the defendants (petitioners here), because the plaintiff's appointment as such Trustee is null and void and of no effect, for the reason that
>
> (2) The District Court, Southern District of New York, sitting as the Court of Bankruptcy in which the plaintiff was appointed as such Trus-

tee, had no jurisdiction under §2(a)(1) of the Bankruptcy Act [11 U. S. C. §11(a)(1)] to adjudge Riverside a bankrupt or to administer its estate, since

(3) Riverside was a Nevada corporation with its principal place of business in California. It had no place of business, principal or otherwise, did no business in and had no property or other assets within the State or Southern District of New York, as required by said §2(a)(1), during the six month statutory period preceding the filing of its voluntary petition in bankruptcy.*

## Opinions Below

No opinion was rendered by the Court of Appeals, Second Circuit, and its decision is not officially or unofficially reported.

The District Court, Southern District of New York, in an opinion not yet reported, denied petitioners' (defendants in that Court) motion for judgment dismissing that action on the same grounds of lack of jurisdiction urged in support of their petition in the Court of Appeals. A copy of that opinion is annexed as an Appendix to this petition.

## Jurisdiction

The judgment and final order of the Court of Appeals was entered on April 29, 1955 (R. D, 1, 2).* No application for reconsideration was filed.

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* References are to pages in Parts A, B, C and D of the Record.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

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The decisions of this Court in the following cases provide procedural authority for the present application for a writ of certiorari to review the denial by the Court of Appeals of the petition for a writ of prohibition or mandamus:

*Norwood* v. *Kirkpatrick,* 348 U. S. 870 (granting certiorari); Decision 99 Law Ed. (U. S.) advance p. 461 (not yet officially reported); *United States* v. *United States District Court for the Southern District of New York, et al.,* 334 U. S. 258 (1948).

## Questions Presented

1. Do the 1952 amendments to §32 of the Bankruptcy Act [11 U. S. C. §55(b)(c)], which refer solely to the "Transfer of Cases", vest in any court of bankruptcy in any State, territory or possession in which a voluntary petition is filed, jurisdiction *to retain* such petition and to make an adjudication of bankruptcy thereon, regardless of the residence, domicile, or principal place of business of the bankrupt?

2. Have the factual requirements as to residence, domicile and principal place of business of the bankrupt, contained in §2(a)(1) of the Bankruptcy Act and heretofore held to be necessary to establish bankruptcy jurisdiction, been repealed or changed by Congress, merely by implication into "a venue statute", by the amendments made to §32 of the Bankruptcy Act by Public Law No. 456, 82nd Congress, Second Session, Effective October 7, 1952 (66 Stat. 424, §11)?

3. Did the United States Court of Appeals for the Second Circuit act arbitrarily and contrary to law in denying, and in failing to grant as a matter of right, petitioners' application for a writ of prohibition or mandamus?

## Statutes Involved

**Section 2, National Bankruptcy Act [11 U. S. C. §11(a)(1)]**

"Chapter 2.—Courts of Bankruptcy

§2. Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent

jurisdiction without the United States, and have property within their jurisdictions, *or in any cases transferred to them pursuant to this title;*

* * * *

(19) Transfer cases to other courts of bankruptcy;"

[As amended May 27, 1926, c. 406, §2, 44 Stat. 662; June 22, 1938, c. 575, §1, 52 Stat. 842; July 7, 1952, c. 579, §2, 66 Stat. 420]

The amendment made to the above Section by Public Law No. 456, 82nd Congress, Second Session, July 7, 1952, c. 579, §2a, effective October 7, 1952 [66 Stat. 420] is indicated by italics.

**Section 32, National Bankruptcy Act [11 U. S. C. §55]**

"Chapter 4.—Courts and Procedure Therein

§32. Transfer of cases

(*a*) In the event petitions are filed by or against the same person or by or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall, by order of the court first acquiring jurisdiction, be transferred to and consolidated in the court which can proceed with the same for the greatest convenience of parties in interest.

[July 1, 1898, c. 540, §32, 30 Stat. 554; June 22, 1938, c. 575, §1, 52 Stat. 857]

(b) *Where venue in any case filed under this title is laid in the wrong court of bankruptcy, the judge may, in the interest of justice, upon timely and sufficient objection to venue being made,*

*transfer the case to any other court of bankruptcy in which it could have been brought.*

(c) *The judge may transfer any case under this title to a court of bankruptcy in any other district, regardless of the location of the principal assets of the bankrupt, or his principal place of business, or his residence, if the interests of the parties will be best served by such transfer."*

[As amended July 7, 1952, c. 579, §11, 66 Stat. 424]

By Public Law No. 456, 82nd Congress, Second Session, former Section 32 was designated subdivision (a) without change, and two new subdivisions (b) and (c) were added.

## Statement of the Case

### The Action Pending Against Petitioners

Lewis H. Saper, as alleged Trustee in Bankruptcy of Riverside, seeks to recover from Long and West, payments of nearly $159,000 paid to them by the Clerk of Los Angeles County, California, upon the ground that those payments constituted preferential or fraudulent transfers recoverable by the alleged Trustee under §§60(b); 67(d)(2a); 67(d)(2d) and 70(e) of the Bankruptcy Act [11 U. S. C. §96(b); §107(d)(2a); §107(d)(2d); §110(e)] (R.B, 1a-16a, Second Amended Complaint). Those payments were made to the petitioners on November 20, 1950 pursuant to a judgment of the Superior Court of California, entered July 28, 1948, after its affirmance by the California District Court of Appeal, and after leave to appeal had been denied by the Supreme Court of California.

The plaintiff invoked the jurisdiction of the District Court under Sections 60(b); 67(e) and 70(e) of the Bankruptcy Act [11 U. S. C. §96(b), §107(e) and §110(e)].

The California judgment, pursuant to which petitioners were paid the sums now in controversy, was entered in an action for a declaratory judgment to establish the rights of various claimants to proceeds from the sale of an option on an iron mine in Riverside County, California (R. B, 4a, 14). The defendants Long and West, and the bankrupt, Riverside, were adverse parties among others claiming such proceeds in the California action.

Defendants assert that the California judgment constitutes an estoppel by judgment against the bankrupt, Riverside, and against the plaintiff, its alleged Trustee in Bankruptcy.

Upon a motion by defendants to dismiss the alleged Trustee's action on that ground, which was denied, the District Court stated (*Saper* v. *Long,* 121 F. S. 65 (S. D., N. Y., 1954, Weinfeld, *D. J.*)) at p. 66:

> ". . . In determining what issues were involved in, essential to, and passed upon in the prior action, the entire record may be searched 'including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court . . .'"

It is, therefore, clearly evident from the above determination: that upon the trial of the alleged Trustee's action in the New York District Court, the transactions which were involved in the California action, which required several months to try

and determine in favor of defendants (petitioners here), will again have to be inquired into.

The petitioner Long is a resident of Warrenton, North Carolina, and petitioner West is a resident of Las Vegas, Nevada. The alleged bankrupt, Riverside, is a Nevada corporation, with its principal place of business in the State of California. Riverside at no time had any office, property or assets in the State of New York or in the Southern District of New York. It was never authorized to do business and never did business in New York.

All the transactions out of which the California litigation arose and out of which the present claims of the alleged Trustee are alleged to have arisen, occurred in California. All of the records of the California action, characterized as a "lengthy trial" (*Saper* v. *Long*, 121 F. S. at p. 65, footnote 4), and substantially all of the witnesses and other evidence, are in California.

**The Lack of Jurisdiction Relied Upon by Defendants Appears of Record Without Factual Dispute**

In the pending action in the District Court the alleged Bankruptcy Trustee seeks to set aside the payments made to defendants as preferential or fraudulent transfers, under §§60(b), 67 and 70(e) of the Bankruptcy Act. Those sections not only confer on a bankruptcy trustee the right to make such claims, but they also specifically confer on the federal courts jurisdiction to hear them.

The existence of a valid adjudication of bankruptcy and of a lawfully appointed bankruptcy trustee, is

prerequisite both to the existence of such claims and to the jurisdiction of the court over that subject matter.

It appears from the record in the Riverside bankruptcy proceeding that on March 15, 1951, Riverside, a Nevada corporation, filed in the Southern District of New York a voluntary petition in bankruptcy and was there adjudicated bankrupt forthwith. (R. B. 61a-64a)

Its petition erroneously alleged, to show bankruptcy jurisdiction in the Southern District, that Riverside had its principal office and place of business at 15 William Street, New York City. (R. B. 61a)

Petitioners were not creditors of Riverside and were not parties and had no knowledge of any of the proceedings in said bankruptcy.

On April 15, 1951 a creditor of Riverside moved to vacate the order of adjudication and to dismiss its voluntary bankruptcy petition upon the ground that the Southern District was without jurisdiction; because at the time of the filing, and for the preceding six months, Riverside had no office or place of business within the Southern District, was not licensed to do business in New York State, and had no assets within the Southern District or State of New York. (R. B. 65a-68a)

The jurisdictional question was referred to an Official Referee as Special Master whose Report found that the facts were as stated in the objections made, and that the principal place of business of

Riverside was in California, and that a substantial majority of its creditors were located there.

The Report concluded that the District Court in New York was and is without jurisdiction under Section 2(a)(1) of the Bankruptcy Act to adjudge Riverside a bankrupt, and that the adjudication should be vacated and the petition dismissed (R. B. 73a-86a).

The Report was confirmed by the Southern District Court which, after reargument, entered an order vacating the adjudication and dismissing Riverside's voluntary petition in bankruptcy for lack of jurisdiction (R. B. 87a-90a).

An appeal was taken from that order and while the appeal was pending the 1952 amendments to the Bankruptcy Act became effective on October 7, 1952. On October 16, 1952, the Circuit Court of Appeals, Second Circuit, upon the application of Riverside, vacated the order and remanded the proceedings to the District Court:

> ". . . for such action as may seem appropriate in the light of the amendments to the Bankruptcy Act contained in Public Law 456—82nd Congress." (R. B., 99a-104a)

The Court of Appeals remanded the proceedings at the suggestion of Riverside, which claimed that the amendments to the Bankruptcy Act contained in said Public Law, would permit the Southern District to *transfer the proceeding to California,* or perhaps to retain it. (R. B., 93a-98a)

However, the District Court *did not reconsider the matter* "in the light of the amendments to the Bankruptcy Act" effective October 7, 1952, as directed by

the mandate. On the contrary, the matter was voluntarily withdrawn from further consideration by the Court, by stipulation between the objecting creditor and the bankrupt to that effect, in consideration of other agreements made between them. (R. B. 107a-111a)

**The Petitioners' Motions in the District Court**

Based upon the foregoing undisputed facts petitioners moved to dismiss the New York District Court action pending against them. The motion to dismiss came on before Honorable Sylvester J. Ryan, of the Southern District of New York, who held that the amendments made in 1952 to the §32 of the Bankruptcy Act constituted an *implied recognition* by Congress that the jurisdictional provisions of §2(a)(1) of the Act were no longer jurisdictional requirements but "related solely to venue". (Appendix pp. 25, 26)

The District Court's order denying defendants' motion to dismiss was entered on April 7, 1955 (R. B., 59a-60a). That order was not appealable (*Central Vermont Transportation Co.* v. *Durning,* 71 F. 2d 273, p. 274 [2 C. A. 1934], affd. 294 U. S. 33 (1935)). Therefore, the only remedy available to the defendants (petitioners here) was to apply for a writ of prohibition or mandamus.

**The Petitioners' Application to the Court of Appeals**

On April 14, 1955, the petitioners moved in the Court of Appeals, Second Circuit, for a writ in the nature of a writ of prohibition or mandamus pursuant

to the "All Writs Section" of the Judicial Code [28 U. S. C. §1651].

The petition to the Court of Appeals was based upon the same jurisdictional grounds urged before the District Court upon the defendants' motion to dismiss the action. (R. A. 4-19)

There is no question as to the propriety of the remedy invoked: *Smith* v. *Whitney,* 116 U. S. 167 (1885), at pp. 174, 176; *Ex parte Peru,* 318 U. S. 578 (1942), at pp. 583-5; *Ex parte Phenix Insurance Co.,* 118 U. S. 610 (1886), at pp. 625-6.

The question of the jurisdiction of the District Court should be determined in advance of trial: *Ex parte Skinner* v. *Eddy Corp.,* 265 U. S. 86 (1924), at pp. 95-6; *Ex parte Simons,* 247 U. S. 231 (1917), at pp. 239-40.

The defect in the Trustee's appointment, being jurisdictional, can be raised by the petitioners in the action pending against them although it constitutes a collateral attack. In such cases the purported appointment is a nullity and completely void and its invalidity is subject to question in any court by any one who may be affected thereby.

*Williamson* v. *Berry,* 49 U. S. (8 How.) 495, 540-41 (1849);
*Elliott* v. *Peirsol,* 26 U. S. (1 Peters) 328 (1828), at p. 340;
*Thompson* v. *Whitman,* 85 U. S. (18 Wall.) 457 (1873), at pp. 468-469;
*Old Wayne Life Ass'n* v. *McDonough,* 204 U. S. 8 (1906), at pp. 15-16.

Nevertheless, the Court of Appeals denied the petition for a writ of prohibition or mandamus without opinion.

However, on June 1, 1955, when denying petitioners' application for a stay pending the determination of the present petition for certiorari, the Court of Appeals definitely confirmed that it had adopted the District Court's interpretation of Section 2(a)(1). The Court of Appeals said:

> "The within motion for a stay is denied. We think Judge Ryan had the jurisdiction he asserted and the action below should proceed."

## Reasons for Granting the Writ

1. The Court of Appeals, Second Circuit, by its denial of petitioners' application for a writ of prohibition or mandamus, has permitted to stand as authoritative a decision of the District Court, holding that the effect of the 1952 amendments to §32 of the Bankruptcy Act, relating solely to transfer of cases, has been to change §2(a)(1) of that Act from a jurisdictional statute to a venue statute.

The decision of the District Court, and the approval of that decision by the Court of Appeals, is contrary to applicable decisions of this Court and of the Courts of Appeals prior to 1952, in the following cases among many others, which hold that §2(a)(1) of the Bankruptcy Act defines the jurisdiction of Courts of Bankruptcy, and that the requirements in that Section are factual prerequisites to jurisdiction to make an adjudication of bankruptcy.

This Court: *Royal Indemnity Co.* v. *American Bond & Mortgage Co.*, 289 U. S. 165 (1932), at pp. 167-8.

Second Circuit: *In re Mitchell,* 219 Fed. 690 (1914), at pp. 692-3; *In re Pusey & Jones Co.,* 286 Fed. 88 (1922), cert. den. 261 U. S. 623; *In re Ettinger,* 76 Fed. 2d 741 (1935), at p. 742.

Sixth Circuit: *Continental Coal Corp.* v. *Roszelle Bros.,* 242 Fed. 243 (1917).

Eighth Circuit: *Home Powder Co.* v. *Geis,* 204 Fed. 568 (1913), at p. 572; *Chicago Bank of Commerce* v. *Carter,* 61 Fed. 2d 986 (1932), at pp. 987-989.

Similar interpretations of the jurisdictional nature of §2(a)(1) appear in cases from the Courts of Appeal of the Fourth, Fifth and Seventh Circuits and of the District of Columbia.

2. The question as to the effect of Section 32 of the Bankruptcy Act upon the jurisdiction of courts of bankruptcy under Section 2(a)(1) of that Act has not been decided by this Court since the amendment of the Bankruptcy Act in 1952, and that important question should be settled.

3. The question whether the jurisdictional requirements of §2(a)(1) of the Bankruptcy Act can be ignored, and a bankrupt choose a district, far from its principal place of business and from the seat of its business operations, to file its voluntary petition in plain disregard of the requirements of §2(a)(1) of the Bankruptcy Act, is a matter of public importance; and the proper construction of the bankruptcy law in that regard presents a question which we believe the Supreme Court should review.

After pointing out that the provisions of §2(a)(1) had been construed by the courts to concern jurisdiction of the subject matter which cannot be waived, 1 *Remington on Bankruptcy* states (pp. 81-82):

> "From the principles stated and cases cited in the preceding section it is clear that the requirements with respect to location of principal place of business, domicile, or residence within the district, are fundamental. A contrary rule would permit a debtor to go into bankruptcy in a distant state, far removed from his creditors and the evidence relating to his business transactions. Assuredly, the rights of the creditors cannot be thus waived by the bankrupt.
>
> *Re Mitchell*, 219 F. 690, 33 A. B. R. 463 (1914, C. A. N. Y.): 'But the law is that the residence or domicile of a bankrupt within the territorial jurisdiction of the court, or his having carried on business within the district for the greater portion of the six months before the filing of a petition by or against him, is an essential jurisdictional fact, without the existence of which the District Court is without authority to proceed to an adjudication in bankruptcy.' "

The question whether Section 2(a)(1) of the Bankruptcy Act remains a jurisdictional statute is basic to proper procedure in bankruptcy cases. That it is of utmost practical importance in the orderly administration of the Bankruptcy Act, was a factor considered of importance by this Court in granting certiorari in the case of *City of New York* v. *Saper, Trustee in Bankruptcy*, 336 U. S. 328 (1949), at p. 329.

4. Sections 2(a)(1) and 32(b)(c) must be interpreted as consistent with each other.

The addition, in 1952, of subdivisions (b) and (c) to Section 32 of the Bankruptcy Act [11 U. S. C. §55], relating to transfers of bankruptcy cases under certain conditons, did not repeal or change the character of Section 2(a)(1) of the Bankruptcy Act as a jurisdictional statute. These subdivisions merely specify conditions under which the courts may exercise the jurisdiction to transfer cases given to them by Section 2(a)(19).

Subdivision (b) of Section 32, read in connection with Section 2(a)(19) of the Act [11 U. S. C. §11(a)(19)], permits a wrong court of bankruptcy *to transfer* a case *to a court in which it could have been brought,* that is: a court having jurisdiction under Section 2(a)(1). But it does not permit the wrong court of bankruptcy *to retain* the case and make an adjudication therein where it has no jurisdiction to make an adjudication by virtue of Section 2(a)(1) of the Act.

Subdivision (c) of Section 32 presupposes a proceeding brought in the right court, that is, a court having jurisdiction under §2(a)(1), for subdivision (b) specifically provides for cases brought in the wrong court.

Subdivision (c) permits the court of bankruptcy in which the petition is filed, *to transfer* the case to the court of bankruptcy in any other district, regardless of the location of the assets, principal place of business, or residence of the bankrupt, if the interest

of the parties will be best served by such transfer. It does not, however, purport to permit the court *to retain* the case, regardless of the location of assets, residence or principal place of business.

Moreover, Congress recognized that the provisions of §2(a)(1) are jurisdictional and remain in effect and that the Court to which a case is transferred under §32(c) would have no jurisdiction by virtue of that subdivision alone. Therefore, by the same Public Law No. 456, Congress amended §2(a)(1) to add: "or in any cases transferred to them pursuant to this title" in order to confer jurisdiction upon the transferee Court to which a transfer is made under §32(c).

We submit that the District Court and the Court of Appeal, Second Circuit, have adopted an erroneous construction of the effect of the 1952 amendments to §32. This construction not only has the vice of an *implied repeal* of the jurisdictional requirements of §2(a)(1), but it also disregards pertinent provisions of §2(a) of the Act.

The District Court concluded that "if §2(a)(1) was jurisdictional" the Court "would then have to dismiss the petition, as it had before the amendment, and could not transfer the suit to another district", disregarding completely the provision in §2(a) . . . (19), which specifically confers *original jurisdiction to transfer* upon the courts of bankruptcy. Said subdivision of §2(a) reads as follows:

> "2(a) . . . (19). Transfer cases to other courts of bankruptcy."

The District Court further stated:

> "By enabling the court to transfer to another district Congress *impliedly recognized* §2(a)(1) to be *simply a venue statute.* We feel this is clearly the intent of Congress reading §2(a)(1) together with §55(c)" [*i. e.,* §32 (c) of the Act]

This not only overlooks the above quoted provision of §2(a) . . . (19), but what is more important, it overlooks the fact that Congress itself, in the 1952 amendments, clearly recognized that §2(a)(1) interposed *jurisdictional requirements.*

This seems clear. The 1952 amendment which added §32(c) to the Act, permits the transfer of a bankruptcy case "in the interest of the parties" to any other court "in any other district regardless of the location of the principal assets of the bankrupt, or his principal place of business". But Congress itself recognized, that under this transfer provision, it was also necessary to confer upon the transferee court jurisdiction to adjudicate the debtor a bankrupt. Otherwise, §32(c) would be in conflict with the jurisdictional requirements of §2(a)(1). Consequently, by the same Public Law which makes the 1952 amendments to §32, Congress added to the end of §2(a)(1) a provision to confer original bankruptcy jurisdiction upon the transferee court reading as follows:

> ". . . or in any cases transferred to them pursuant to this title."

Congress thus specifically recognized that §2(a)(1) was jurisdictional and not merely a matter of venue.

We submit, therefore, that the conclusion reached below as to the effect of the 1952 amendments to §32 on the jurisdictional requirements of §2(a)(1) of the Act, is neither sound nor supported by the provisions of the amended Act itself; and it stands in conflict with all prior adjudications as to the meaning of §2(a)(1).

It is also submitted that Congress never intended that a debtor be authorized to file a bankruptcy petition in any District he may choose and have it adjudicated there, regardless of whether he has resided or done business there. If that can be done, the practice of fraud upon a bankrupt's creditors would be simplified. In addition, situations of great hardship and injustice, as in the present case, could arise with respect to all third persons having business dealings with the bankrupt, who, under the construction placed by the courts below upon the amendments in question, are deprived of any right to object to the validity of an adjudication of bankruptcy voluntarily obtained in such distant forum.

5. The Court of Appeals, in denying the petitioners' application for a writ of prohibition or mandamus, acted contrary to the law as established by this Court in *Smith* v. *Whitney, supra,* where this Court held (116 U. S., at page 174) that in a case where lack of jurisdiction clearly appears from the record, the defendant was entitled to a writ of prohibition "as a matter of right".

WHEREFORE, your petitioners respectfully pray that a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 6, 1955.

# APPENDIX

## OPINION OF THE DISTRICT COURT

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket No. Civil 81-1

---

LEWIS H. SAPER, as Trustee in Bankruptcy of the Estate of RIVERSIDE IRON AND STEEL CORPORATION, Bankrupt,

Plaintiff,

—against—

W. LUNSFORD LONG and HEWITT S. WEST,

Defendants.

---

MEMORANDUM ENDORSED.

Defendants move for leave to serve an amended answer pleading an additional defense that plaintiff is without legal capacity to sue because the court of Bankruptcy in which he was appointed Trustee was without jurisdiction to entertain the bankrupt's voluntary petition or to administer the bankrupt estate. Defendants, with the pleadings so amended, also move for summary judgment.

It appears of record that on March 15, 1951, Riverside Iron and Steel Corp., a Nevada corporation, filed in this district a voluntary petition and was adjudicated a bankrupt; that the petition alleged that Riverside had its principal office and place of business at 15 William Street, New York City; that on April 15th, 1951, a creditor of Riverside moved to vacate the order of adjudication and

to dismiss the petition upon the ground that this court was without jurisdiction because at the time of the filing and for the preceding six months Riverside had no office or place of business within the district, was not licensed to do business in New York State and had no assets within the district or the state; that a special master's report sustaining the objections so made was confirmed; and that on December 24th, 1951 an order of this court was made vacating the adjudication and dismissing Riverside's voluntary petition. It further appears of record that thereafter an appeal to the Court of Appeals was duly filed from this order and on October 16th, 1952 that court ordered that the order of December 24th, 1951 be vacated and remanded the proceedings "for such action as may seem appropriate in light of the amendments to the Bankruptcy Act contained in Public Law 456—82nd Congress."

It also appears of record that thereafter and on December 24th, 1952 an order was entered upon consent of the objecting creditor withdrawing its petition to dismiss, and that the plaintiff herein was appointed Trustee of the bankrupt estate.

The defendants are not precluded by the pretrial order from now seeking leave to plead a new defense.

I assume, for the purpose of these motions, that defendants are also not precluded by their pretrial stipulation from challenging the lack of jurisdiction of this court to entertain Riverside's voluntary petition in bankruptcy, to adjudicate it a bankrupt or to appoint plaintiff Trustee of the bankrupt estate. I conclude, nevertheless, that defendants may not in this suit challenge plaintiff's capacity, the regularity of his appointment or the determinations made by the bankruptcy court.

With the filing of the mandate from the Court of Appeals, the petition to vacate the adjudication was left pending and undetermined; the order of December 24th, 1951 dismissing the petition was vacated as were the

factual findings upon which it was predicated, unless they were again accepted by the affirmative act of the court, which they never were. If anything, the decision of the objecting creditor to withdraw without further challenge, and the judicial approval of that withdrawal may well have implicitly determined that venue was properly laid in the bankruptcy court of this district.

The provisions of Public Law 456—82nd Congress, effective as of October 7th, 1952, by section 56B was made "applicable in cases pending when it takes effect." It amended section 32 of the Bankruptcy Act (11 U. S. C. A. § 55) to provide:

> "(b) Where venue in any case filed under this title is laid in the wrong court of bankruptcy, the judge may, in the interest of justice, upon timely and sufficient objection to venue being made, transfer the case to any other court of bankruptcy in which it could have been brought.
>
> "(c) The judge may transfer any case under this title to a court of bankruptcy in any other district, regardless of the location of the principal assets of the bankrupt, or his principal place of business, or his residence, if the interests of the parties will be best served by such transfer."

The Court of Appeals remanding specifically called attention to this enactment.

The very passage of section 32 of the Bankruptcy Act permitting a court to transfer cases to other districts was a recognition by Congress that section 2(a)(1) related solely to venue. If §2(a)(1) was jurisdictional and a bankruptcy court determined that the bankrupt was not resident within its district for the prior six months or resident within its district for the greater portion thereof than in any other district, the court would then have to dismiss the petition, as it had to before the amendment, and could not transfer the suit to another district. The

court would be without power. By enabling the court to transfer to another district Congress impliedly recognized §2(a)(1) to be simply a venue statute. We feel this is clearly the intent of Congress reading §2(a)(1) together with §55(c).

Moreover, the defendants, may not in this suit collaterally attack the determination of the bankruptcy court as to whether venue was properly laid in it.

Motion to serve an amended answer is denied, as upon the record the defense it seeks to plead is insufficient in law.

Motion for summary judgment is denied.

Defendants also move to transfer under §1404.

A prior motion for summary judgment on which defendant urged the California judgment as res judicata and as an equitable estoppel to the filing of this suit was denied by Judge Weinfeld, who felt that the merits of this defense should be appraised by the trial judge. In determination of the applicability of res judicata or equitable estoppel a retrial of the California suit is neither necessary nor permissible. The evidence admissible on this aspect of the suit is entirely documentary and the genuineness of the pertinent records has been covered by pretrial stipulation. I am not therefore impressed with the merits of the motion to transfer.

This suit has been at the head of the Day Calendar for trial since May, 1954; pretrial hearings were held in October, 1954, and a pretrial order made in November, 1954. Trial has been set for April 4, 1955. We have been informed that it has been adjourned until the May term. The interests of justice will not be served to direct a transfer under §1404 on the very eve of trial in this suit which has been pending since December, 1952. Motion to transfer denied.

April 1st, 1955

SYLVESTER J. RYAN
U. S. D. J.

FILED
JUL 7 1955
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1955**

**No. 123**

W. LUNSFORD LONG and HEWITT S. WEST,
*Petitioners,*

—against—

HONORABLE SYLVESTER J. RYAN and THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York 38, N. Y.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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### Statement

Petitioners seek a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that Court's denial of their application for a writ in the nature of a writ of prohibition or mandamus.

### The Action Pending Against Petitioners

Their application to the Court of Appeals (R. A. 4-19)* sought to enjoin the United States District Court for the Southern District of New York from trying an action there pending against them which had been placed at

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* References are to pages in Parts A, B, C and D of the Record.

the head of the Day Calendar for trial. The action would have been reached for trial in March of 1955 but for the District Court's granting an adjournment pending disposition of petitioners' application to the Court of Appeals.

**The Objection to Jurisdiction Prior to Enactment of 1952 Bankruptcy Amendments**

Riverside Iron and Steel Corporation, hereinafter referred to as "Riverside" or the "bankrupt", had filed a voluntary petition in bankruptcy at the United States District Court for the Southern District of New York, on March 14, 1951, and was adjudicated a bankrupt that day. Lewis H. Saper was appointed its trustee in bankruptcy on January 13, 1953 (R. B. 112a). The delay in the appointment of a trustee was created by the interposition of an objection to the bankruptcy proceeding by a creditor on the ground that Riverside neither had its principal office or place of business in said District nor, for that matter, was it incorporated in the State of New York or had any of its assets in that State (R. B. 66a-68a.)

The bankruptcy proceeding was dismissed, following a recommendation by a Referee in Bankruptcy, acting as Special Master, after taking considerable testimony (R. B. 88a-90a). While an appeal from the order of dismissal was before the United States Court of Appeals, Congress enacted Public Law No. 456, 82nd Congress, Second Session which substantially changed the existing Bankruptcy Act. Some of the changes materially affected this bankruptcy. The amendments, which became effective October 7, 1952, applied to pending proceedings. New Section 32(b) permitted the retention of the bankruptcy in the Southern District of New York. This section will be discussed at greater length at another part of this brief.

The United States Court of Appeals, when informed of the change in the Bankruptcy Act, vacated the order of dismissal, and remanded the proceeding to the District Court for further action in light of the new legislation (R. B. 100a-104a). The objecting creditor, after being apprised of the changes in the law, withdrew its objection, and the Hon. Edward Weinfeld, District Judge, who previously had signed the order of dismissal, signed an order withdrawing the objection to Riverside's order of adjudication (R. B. 107a-108a).

**The Facts and Decision in the California Litigation**

Riverside's Trustee, through his counsel, ascertained that Riverside had owned a lease and purchase agreement for real property at Riverside, California, known as the "Iron Chief Property". The realty contained substantial iron deposits. Harlan H. Bradt, hereinafter referred to as "Bradt", who was president of Riverside, in 1942, duly assigned the corporate interest in said lease and purchase agreement to one E. T. Foley, hereinafter referred to as "Foley". The consideration for the assignment to Foley obligated him to work the mine, pay the taxes and rentals due and otherwise protect Riverside's rights in the lease and purchase agreement. The agreement with Foley also provided that upon Foley's disposition of the lease and purchase agreement to a third party, Riverside was to receive a portion of the proceeds of the sale. Foley carried out the necessary provisions and sold the lease and purchase agreement to a third party.

Bradt and Riverside contended that Foley had sold the property for an inadequate consideration. Foley, thereupon, in 1946, brought an action at the Superior Court of the State of California, in and for Los Angeles County, for a declaratory judgment to determine the propriety of the sale, and to ascertain the proper disposition of

the proceeds thereof. That Court, in 1948, awarded to Riverside and Bradt approximately $250,000.00 of the proceeds for the assignor's interest in the agreement with Foley.

Only one of Riverside's creditors was a party in the Foley action. That was because it also had a claim against Foley. The California Court adjudicated said creditor's claim against both Foley and the bankrupt and made the appropriate award from the bankrupt's interest.

The instant petitioners were defendants in the Foley action because of their claim to the proceeds. They also cross-claimed against Riverside and Bradt contending, among other things, that each was a one-third equitable stockholder of Riverside and had never received the stock certificates. The Court gave each of them one-third (⅓) of the proceeds from the sale of said lease and purchase agreement, this in the face of there being over forty (40) creditors, to whom the bankrupt is indebted by judgments alone for upwards of $140,000 (R. C. 3), who had no notice of the Foley action.

The Trustee, when Receiver, construed the acceptance of the money awarded to petitioners as both fraudulent conveyances and preferential transfers. Accordingly, on December 10, 1952 he brought an action against them at the United States District Court for the Southern District of New York to recover said sums and thus permit all Riverside's creditors to recover on their proven claims before making available any part of the corporate assets to Riverside's stockholders (R. C. 23; 2nd Amended Complaint, R. B. 1a-16a).

Since December 10, 1952 petitioners have resorted to all possible means to avoid the trial of the issues as created by the pleadings. Petitioners' dilatory tactics

are apparent from an examination of a photostatic copy of the Clerk's Minutes in said action (R. C. 23-25).

**The Petitioners' Motion in the District Court**

The motion, the denial of which prompted petitioners to seek a writ in the nature of a writ of prohibition or mandamus, constituted a collateral attack on the bankruptcy. Petitioners claimed that the bankruptcy proceeding is a nullity and void. That reasoning permits the conclusion that Mr. Saper's appointment as Receiver and later as Trustee was void and that he had no power to bring the action.

This motion was made at a time when the case had been set for trial, and placed at the head of the Day Calendar for March 7th, 1955. Petitioners obtained adjournments of the trial during the pendency of the motion and when a decision adverse to their interests was rendered they sought and obtained an additional delay to permit an application to the United States Court of Appeals for a writ in the nature of a writ of prohibition or mandamus. They hoped that a decision dismissing the bankruptcy, after three years of active opposition, would preclude any trustee in bankruptcy of Riverside from effectively attacking their right to retain the $158,796.96 which they received. They thereby would avoid having to pay anything to Riverside's creditors who advanced the necessary funds to husband the lease and purchase agreement until its sale.

**The Petitioners' Application to the Court of Appeals**

Unable to appeal directly to the United States Court of Appeals, petitioners resorted to a writ in the nature of a writ of prohibition or mandamus. The application was unanimously denied by the Second Circuit.

**Reasons for Denying the Writ**

The petition for a writ of certiorari should be denied because:

(a) Neither the facts herein nor the applicable law are of sufficient importance to warrant issuance of a writ of certiorari.

(b) The United States Court of Appeals for the Second Circuit did not abuse its discretion in denying petitioners' application for a writ in the nature of a writ of prohibition or mandamus.

(c) Section 32(b) of the Bankruptcy Act permits the United States District Court for the Southern District of New York to retain jurisdiction of the Riverside bankruptcy proceeding.

## POINT I

**Neither the facts herein nor the applicable law are of sufficient importance to warrant issuance of a writ of certiorari.**

The instant proceeding results from a denial of petitioners' application to the United States Court of Appeals for the Second Circuit for a writ in the nature of a writ of prohibition or mandamus (R. D. 2-3). It does not relate to a direct review of Section 32(b) of the Bankruptcy Act. The action is at the head of the Day Calendar for trial at the District Court and is the first case to be assigned out for trial at the opening of Court this coming October. Petitioners will then have an opportunity to process a direct appeal should the Trustee in Bankruptcy succeed. Petitioners could then, on appeal, obtain a construction of Section 32(b) from the United States Court of Appeals.

The petitioners attempted to dismiss the pending action on the ground of *res adjudicata* and equitable estoppel by judgment. The Hon. Edward Weinfeld, District Judge, in passing on the motion for such relief said:

> ". . . Also involved in that state action (the Foley action referred to in the moving papers) was a dispute between Foley, on the one hand, and Riverside and Bradt, on the other, as to the validity of Foley's sale. Causes of action under the Bankruptcy Act were not adjudicated. Thus, we deal here, not with the doctrine of *res adjudicata*, but with an aspect of it—collateral estoppel . . ."
>
> • • • •
>
> "Our inquiry is to determine whether upon the record submitted on this motion the issue now presented of the right to the funds as between Riverside, on the one hand, and West and Long, on the other, is the same as that litigated and necessarily determined in the original action."
>
> • • • •
>
> "In sum the record leaves it far from clear, at least for purposes of determination of a motion for summary judgment that the issue of property rights in the proceeds as between the corporation, on the one hand, and Long and West, on the other, was distinctly litigated, decided and made material to the principal action." (Matter in parentheses ours.)

Petitioners contend that much time will be required to try the case because the issues passed upon in the California case have to be retried. There is no justification for that conclusion. The affirmative defense of *res adjudicata and equitable estoppel by judgment* necessitates review only of what had previously taken place. No new testimony thereon is competent. The Hon. Sylvester J. Ryan, District Judge, who passed upon a motion to transfer the action to a district court in California said, in

discussing the issue regarding the evidence required for the affirmative defense:

> "A prior motion for summary judgment on which defendant urged the California judgment as *res adjudicata* and as an equitable estoppel to the filing of this suit was denied by Judge Weinfeld, who felt that the merits of this defense should be appraised by the trial judge. In determination of the applicability of *res adjudicata* or equitable estoppel a retrial of the California suit is neither necessary nor permissible. The evidence admissible on this aspect of the suit is entirely documentary and the genuineness of the pertinent records has been covered by pretrial stipulation. I am not therefore impressed with the merits of the motion to transfer."

Since the action is in all other respects a normal fraudulent conveyance or preferential transfer case, the evidence required, in addition to the matter already now part of the record, could be submitted by both sides in about a week. Petitioners, therefore, would suffer little hardship if compelled to try the action and pursue a review of Section 32(b) of the Bankruptcy Act along proper channels.

It is conceded that this Court is disposed to entertain petitions for certiorari to resolve a conflict of different views on a provision of practice important to the administration of the Bankruptcy Act.

> *City of New York* v. *Saper, as Trustee in Bankruptcy,* 336 U. S. 328, 329 (1949).

The above case was cited by petitioners in support of their view. But there has been no conflict of judicial views as to the meaning of Section 32(b), in so far as it relates to the disputed issues herein. Nor, for that

matter has *any* Circuit defined the meaning of Section 32(b) as it pertains to the immediate issue.

Both the text of Section 32(b) and the Congressional intent thereof as expressed in committee reports on the bill which became Public Law No. 456, 82nd Congress, Second Session, hereinafter discussed under Points II and III herein, clearly reveal the meaning of the legislation. The Court of Appeals for the Second Circuit was so convinced of the absence of merit in petitioners' interpretation of Section 32(b) that, when called upon to stay the trial of the action while this Court passes upon the current application, it volunteered the following:

> "The within motion for a stay is denied. We think Judge Ryan had the jurisdiction he asserted and the action below should proceed."

There is nothing novel, new, or vague in the language of Section 32(b) of the Bankruptcy Act which justifies stopping the bankruptcy proceeding and all actions instituted by the Trustee for the benefit of the creditors until a judicial construction is first obtained of that section.

## POINT II

**The United States Court of Appeals for the Second Circuit did not abuse its discretion in denying petitioners' application for a writ in the nature of a writ of prohibition or mandamus.**

The only question before this Court is whether the United States Court of Appeals for the Second Circuit erred in denying petitioners' application for a writ in the nature of a writ of prohibition or mandamus. The writ is available as a matter of right only when the sub-

ordinate court clearly lacks jurisdiction. This Court has denied writs of prohibition when the jurisdiction of the subordinate court was in doubt.

> *Petition of United States,* 263 U. S. 389 (1923);
> *Wabash Railroad Co.* v. *Duncan,* 170 F. 2d 38 (1948) (8 C. A.), cert. den. 336 U. S. 904 (1949).

*In re Rice,* reported in 155 U. S. 396 (1894), states the principle governing the exercise of a writ of prohibition, a principle that has been reiterated and adhered to in subsequent cases. This Court stated therein:

> "Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary."

That view guided this Court in its disposition of *Ex parte Republic of Peru,* 318 U. S. 578 (1943).

The test established in *In re Rice, supra,* requires the establishment of the following combination of circumstances in order to be entitled to a writ of prohibition as a matter of right:

1. That the aggrieved party has no other remedy;
2. That the aggrieved party objected to the jurisdictional defect at the outset;
3. That the court wherein the action is brought "clearly" lacks jurisdiction.

Point I, which has treated with petitioners' right to review the determination of the District Court, manifestly shows that there is a remedy available other than the immediate one denied by the Court of Appeals.

Petitioners asserted their objection to the jurisdiction more than two years after the commencement of the action. Such belated assertion fails to comply with the second constituent set forth above.

To determine the jurisdiction of the District Court, reference must be made to Sections 32(b) and 32(c) of the Bankruptcy Act which Congress adopted in 1952. These read:

> "(b) Where venue in any case filed under this title is laid in the wrong court of bankruptcy, the judge may, in the interest of justice, upon timely and sufficient objection to venue being made, transfer the case to any other court of bankruptcy in which it could have been brought."
>
> "(c) The judge may transfer any case under this title to a court of bankruptcy in any other district, regardless of the location of the principal assets of the bankrupt, or his principal place of business, or his residence, if the interests of the parties will be best served by such transfer."

Both the Senate and the House Committees on the Judiciary made clear their views as to this change. The unanimous House Report pertinent thereto reads:

> "Section 11 of the bill adds two subdivisions to the present section 32. That section deals with the transfer of cases, but, as presently written, it covers only the case of two petitions against the same person or partnership. The first subdivision proposed to be added incorporates the substance of the general statute on venue of district courts stated in

Title 28, section 1406, United States Code, modified only to accommodate it to the Bankruptcy Act. *Under this first subdivision, the judge may upon timely and sufficient objection transfer a case brought in the wrong court of bankruptcy.* This first subdivision also incorporates the amendment to section 1406 which changed 'shall' to 'may, in the interest of justice.' *Ordinarily, no doubt the venue rules in bankruptcy will serve the interest of justice, but in the event that in the special case they do not, the judge will have discretion to retain the proceeding.* (Italics ours.)

"The second subdivision proposed to be added makes available to the bankruptcy judge a power to transfer a case, in the interest of the parties, similar to that now accorded the judge in a non-bankruptcy proceeding by section 1404(a) of title 28. This power could already be exercised by a judge in a chapter X proceeding because of the authority granted by section 118. A clause is also added to section 2a(1) of the act by section 2(a) of the bill to authorize the court to exercise jurisdiction in a case so transferred to it."

House Report No. 2320, 82nd Cong., 2nd Session.

The unanimous Senate Report thereto reads:

"Section 11 of the bill adds two subdivisions to section 32 of the act. Section 32 deals generally with the transfer of cases and, as written, it deals only with a situation where two petitions are filed against the same person or partnership in the different courts, and where each court has jurisdiction of the proceeding under section 2a(1) of the act. Section 2a(1) circumscribes the jurisdiction to the principal place of business, residence, or domicile of a debtor located within the territorial limits of the court.

"The first amendment, new subdivision b, incorporates the substance of the general statute on venue of district courts stated in section 1406 of title 28, United States Code, modified to the extent necessary to accommodate its provisions to the Bankruptcy Act. Under this amendment, where a proceeding has been filed in the wrong court of bankruptcy, *i. e.*, where the court has no jurisdiction under the provisions of section 2a(1) of the act, *the judge may*, nevertheless, *upon timely and sufficient objection, transfer the proceeding to a court in which it might properly have been filed.* The amendment also incorporates the recent modification made in section 1406, which changed 'shall' to 'may, in the interest of justice'. For the purposes of bankruptcy administration, *the power to transfer a proceeding improperly filed in a bankruptcy court, would serve generally the interest of justice; but if in a particular case such interest would not be served, the judge may, nevertheless, in his discretion, retain the proceeding, despite the limiting provisions of section 2a(1) of the act.* (Italics ours.)

"The second amendment, new subdivision c, empowers the bankruptcy judge to transfer a case, in the interest of the parties to any other bankruptcy court in the same manner as is now permitted by section 1404(a) of title 28, to the judge of a district court in a non-bankruptcy proceeding."

Senate Report No. 1395, 82nd Cong., 2nd Session.

With the appropriate committee of both Houses of Congress stating that when a bankruptcy proceeding has been brought in the wrong court of bankruptcy, the latter could, nevertheless, process it, surely there is at least sufficient doubt of the complete absence of jurisdiction, to permit the exercise of discretion by the United States Court of Appeals for the Second Circuit in deny-

ing the petition for a writ of prohibition. Nothing has been advanced by petitioners to show that the Court of Appeals was arbitrary in exercising its discretion in refusing the writ.

As to the issuance of a writ of mandamus, this court has been reluctant to interfere with decisions of lower courts on questions of jurisdiction, particularly in instances where the lower courts are competent to pass on jurisdictional questions and such questions are reviewable on appeal from final judgments.

*Roche* v. *Evaporated Milk Association,* 319 U. S. 21 (1943);
*S. J. Groves & Sons Co.* v. *Warren,* 135 F. 2nd 264 (1943) (C. A. D. C.), cert. den. 319 U. S. 766 (1943).

Mandamus was not granted when the party had a right to appeal.

*Larsen* v. *Switzer,* 183 F. 2nd 850 (1950) (8 C. A.), cert. den. 340 U. S. 911 (1951);
*Jewell* v. *Davies,* 192 F. 2nd 670 (1951) (6 C. A.), cert. den. 343 U. S. 904 (1952).

Applying the tests for issuance of a writ of prohibition and a writ of mandamus, the language of Sections 32(b) and 32(c) of the Bankruptcy Act, and the views thereon by the entire membership of the House and Senate Committees on the Judiciary, the United States Court of Appeals for the Second Circuit was justified in denying petitioners' application for such writs.

## POINT III

**Section 32(b) of the Bankruptcy Act permits the United States District Court for the Southern District of New York to retain jurisdiction of the Riverside bankruptcy proceeding.**

Respondents submit that Section 32(b) of the Bankruptcy Act, which became effective on October 7, 1952 applied to all pending cases and permits the continued processing of the Riverside bankruptcy at the United States District Court for the Southern District of New York.

A discussion of the question covered by this Point requires consideration of Sections 2a(1), 2a(19) and 32 of the Bankruptcy Act as same existed prior to the enactment of Public Law No. 456, 82nd Congress, Second Session, and the changes and additions to those sections.

When the Riverside bankruptcy was filed, subdivision (1) of Section 2a, which dealt with the jurisdiction of bankruptcy courts, empowered such courts to:

> "(1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdiction;"

Subdivision (19) of said Section 2a empowered the courts to:

> "Transfer cases to other courts of bankruptcy;"

and Section 32 which dealt with the transfer of cases stated that:

> "In the event petitions are filed by or against the same person or by or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall, by order of the court first acquiring jurisdiction, be transferred to and consolidated in the court which can proceed with the same for the greatest convenience of parties in interest."

Public Law No. 456, *supra*, added the following to Section 2a(1):

> "or in any cases transferred to them pursuant to this Title;"

It did not change the text of Section 2a(19). Section 32 was recapped as Section "32(a)" and Sections 32(b) and 32(c) which are set out in full herein on page 11 were added.

Petitioners contend that Section 2a(1) is a jurisdictional provision; and that the bankrupt's failure to comply with it resulted in a void proceeding thereby making the United States District Court for the Southern District of New York powerless to process it. They also contend that Section 2a(19) read in conjunction with new Section 32(b), limits the power of the wrong court to transfer the bankruptcy case to the right court. Petitioners construe the addition to Section 2a(1) enacted by Public Law No. 456, *supra*, to authorize the transferee court to process the case. They maintain that a wrong court wherein a petition is initially filed may not process it; its power is limited to transferring the case.

Petitioners discuss cases, including those in the Second Circuit, which held that Section 2a(1) was a jurisdictional provision and that, in the absence of proper compliance therewith, a bankruptcy case could not be processed. Respondents do not question the validity of this interpretation of the section as it existed prior to the enactment of Public Law No. 456. *There is no doubt that before the adoption of Sections 32(b) and 32(c) of the Bankruptcy Act Section 2a(1) was construed as the sole jurisdictional statute.* That *construction no longer applies in light of the enactment of Section 32(b),* the first phrase of which reads:

> "Where venue in any case filed under this title is laid in the wrong court of bankruptcy . . ."

If Section 2a(1) is still the sole basis for jurisdiction, 32(b) is meaningless because nothing could be done to process the bankruptcy case and the court would have to wait until a proper party moved for the transfer.

Petitioners contend that Section 2a(19) amply treats the situation because it empowers the wrong bankruptcy court to transfer the case to the proper court. That construction is not sound. The section should be interpreted in the light of the situation it sought to remedy.

Section 2a(1) permits the filing of voluntary or involuntary bankruptcy cases, in districts where the bankrupt either resided, was domiciled, had his principal place of business, or had property. It has not been uncommon for petitions to be filed in more than one district. Each case when filed had to pass the test of Section 2a(1) as to jurisdiction. Section 32(a), which has been in operation since 1898, permits the transfer of all of the bankruptcy cases pertaining to any individual, partnership or corporation to the district where the first petition was filed, and consolidates all of said cases in one court.

It supplies the conditions of the transfer, and Section 2a(19) the authority for such transfer. These sections were not changed by the recent amendments.

The door has now been widened to permit the following situations:

(1) Under Section 32(b), when no timely and sufficient objection is made by virtue of Section 2a(1), a wrong court may process it;

(2) The court under Section 32(c), despite conformance with Section 2a(1), may transfer a case to any other court of bankruptcy if the interests of the parties will be best served by such transfer.

Section 2a(1), as amended, no longer constitutes the sole test for jurisdiction. It applies to all cases except those filed in a wrong court. As to the latter it is applicable only if timely or sufficient objection is made. In the absence of such objection the so-called wrong court is empowered to process the cases.

Congress made clear what it sought to accomplish. The members of the Committees on the Judiciary of both Houses unanimously stated in substance:

> "For the purposes of bankruptcy administration, *the power to transfer a proceeding improperly filed in a bankruptcy court, would serve generally the interest of justice; but if in a particular case such interest would not be served, the judge may, nevertheless, in his discretion, retain the proceeding, despite the limiting provisions of section 2a(1) of the act.*" (Italics ours.)

The draftsmanship of Section 32(b) is in full accord with that conclusion. What construction can be given to the following excerpt thereof other than that the wrong

court has the power to process the case until an appropriate objection is made?

> "The judge may, in the interest of justice, upon timely and sufficient objection to venue being made, transfer the case to any other court of bankruptcy in which it could have been brought."

The limitation of an objection to timeliness and sufficiency carries with it the implication that until such conditions are met the court wherein the case is pending may proceed with the liquidation of the bankrupt's assets as provided for by the Bankruptcy Act. If a transfer may be made in the interest of justice, it may likewise be retained in the interest of justice. Should the wrong court decide that a motion to transfer is timely, appropriate, and in the interest of justice, all orders theretofore entered in the case are binding except as modified by the court in the order of transfer.

If that were not the case nothing could be done in the wrong court until a motion for transfer was approved. The bankrupt's assets might be dissipated in the meantime and remedies available to creditors, through their representative the trustee, might become unenforcible due to the delay in the filing of a petition in a proper court when such rights are measured from such date.

The Bankruptcy Act now grants jurisdiction to every district court. It is then incumbent upon the Court to exercise its discretion in the interest of justice in determining whether to retain or, in the alternative, to transfer the case to any other court. The amendment became necessary in order to remedy abuses of the then prevailing law which oftentimes defeated the rights of creditors. Previously, dismissal of the cases under Section 2a(1) after a substantial time interval, resulted in the preclusion of creditors from recovering preferences

which definitively are limited to activities within four months of a *proper* filing. Congress enacted Section 32(b) to remedy that harsh result.

Section 2a(1) is no longer the sole basis for jurisdiction of a bankruptcy case. Section 32(b) confers jurisdiction and is also a venue statute.

## CONCLUSION

**It is respectfully submitted that the petition for a writ of certiorari be denied in all respects. Since the bankrupt estate, from which this proceeding emanates, possesses no assets and the cost for responding to the petition is borne by the Trustee thereof, it is respectfully urged that this Court award respondents' costs and disbursements.**

Dated: New York, July 6, 1955.

Respectfully submitted,

I. ARNOLD ROSS,
*Counsel for Respondents.*

FILED
JUL 15 1955
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1955**

**No. 123**

W. LUNSFORD LONG and HEWITT S. WEST,

*Petitioners,*

—against—

HONORABLE SYLVESTER J. RYAN and THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,

*Respondents.*

## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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### POINT I

**The facts, established beyond dispute, show the lack of bankruptcy jurisdiction in the District Court.**

The brief in opposition to the petitioners' application for certiorari, does not dispute a single fact upon which petitioners base their contentions: that the District Court was without jurisdiction to adjudicate Riverside Iron and Steel Corporation bankrupt, and appoint Lewis H. Saper as its alleged Bankruptcy Trustee; and that the District Court was, therefore, without jurisdiction of the Trustee's action against petitioners under the Bankruptcy Act. That Act confers the right to bring such actions only on law-

fully appointed Bankruptcy Trustees and also confers jurisdiction on the District Courts to hear such claims [§60, §67, §70(e) and (f); 11 U. S. C. §§96, 107, 110(e) and (f)].

The facts being undisputed, the controversy resolves itself into an important public question of law as to the proper interpretation and effect to be given to the 1952 amendments to the Bankruptcy Act.

The undisputed facts out of which this jurisdictional dispute has arisen will not be altered by a trial of the alleged Trustee's action against petitioners in the District Court, however extended; nor by any subsequent appeal to the Court of Appeals for the Second Circuit. Moreover, both lower courts have already expressed their views, to the effect that the 1952 amendments to §32 of the Bankruptcy Act do impliedly repeal the jurisdictional requirements of §2(a)(1) as amended in 1952.

This important question with respect to bankruptcy jurisdiction is, therefore, now ripe for decision by this Court, and it presents a question of great public importance in the practical administration of the bankruptcy laws.

In the brief opposing certiorari, the attorney for the alleged Trustee argues that this jurisdictional question should not be considered by this Court, until after the case has been tried and disposed of on the merits. Under the circumstances presented here, however, that argument is without merit. The very purpose of writs of prohibition is to prevent a lower court from subjecting defendants to the expense and

burden of a defense on the merits, where the lower court is acting without jurisdiction.

In the present case, petitioners, the defendants in the District Court, have already decisively defeated the claim of the present bankrupt corporation to the funds in controversy, after a very extensive trial in the courts of California and appeals up to the Supreme Court of that State.

It was only after denial of the bankrupt's application for leave to appeal to the Supreme Court of California that its voluntary petition in bankruptcy was filed in the Southern District of New York, far removed from its principal place of business in California, and where it never did business and was not domiciled.

The filing of the voluntary petition in the Southern District of New York and the bringing there of an action against petitioners to recover, as allegedly fraudulent or preferential transfers, the payments made to petitioners pursuant to the judgment of the California court, constitutes simply a device to retrieve, if possible, the bankrupt's defeat under the California judgment.

The Southern District of New York had no jurisdiction to adjudicate Riverside a bankrupt and, we submit, all that court could do was to transfer the bankrupt's petition to the Southern District of California, the district of its principal place of business, for adjudication there, pursuant to §32(b) of the Act as amended in 1952. *In re Marine Aircraft Corp.*, 118 F. S. 844 (S. D. N. Y. 1954, Dimock, *D. J.*).

Nor did petitioners delay, as contended in the opposing brief (pp. 10-11), their objection to the jurisdiction. Such objection was promptly made as soon as the facts supporting the objection became known to petitioners' counsel (R. A. 8-9).

## POINT II

**The 1952 amendments do not confer jurisdiction on the "wrong court of bankruptcy" to make an adjudication and to appoint a trustee.**

Respondents' brief in opposition makes it clear: (1) That the questions presented are novel; (2) That they are of public importance in the practical administration of the National Bankruptcy Act; (3) That the decisions of the District Court, Southern District of New York, and of the Court of Appeals, Second Circuit, on the question of the jurisdiction of the Bankruptcy Court, are in direct conflict with the decisions prior to the 1952 amendment of the Bankruptcy Act; and (4) That the jurisdictional question presented should be settled by this Court.

There can be no doubt that the questions presented, involving as they do the jurisdiction of all the courts of bankruptcy, are of great public importance and will be of frequent recurrence.

Respondents concede that the decision of the Court of Appeals and the decision of the District Court do not accord with the consistent decisions of the federal courts prior to 1952.

With respect to the cases cited by the Petitioners which uniformly hold "that Sec. 2(a)(1) was a jurisdictional provision", the Respondents state (Brief, p. 17):

> "Respondents do not question the validity of this interpretation of the section as it existed prior to the enactment of Public Law No. 456. *There is no doubt that before the adoption of Sections 32(b) and 32(c) of the Bankruptcy Act Section 2a(1) was construed as the sole jurisdictional statute.* That *construction no longer applies in light of the enactment of Section 32(b),* . . ."

The addition of §32(b) by the 1952 amendments does not confer jurisdiction on a "wrong court of bankruptcy" to make an adjudication in bankruptcy; nor does it authorize such court to appoint a trustee and to administer the bankrupt's estate.

A "wrong court of bankruptcy" is a court not empowered by §2(a)(1) of the Act to make an adjudication of bankruptcy. That is, a court within whose territorial jurisdiction the debtor is not resident or domiciled, or within which it does not have its principal place of business.

Respondents argue (Brief, pp. 18-20) that §32(b) of the Act has empowered a "wrong court" *to retain* any case brought therein and to adjudge any debtor a bankrupt, regardless of residence, domicile or principal place of business.

However, the language of §32(b) confers no power upon a "wrong court" to retain a case. It merely

authorizes the "wrong court", instead of dismissing the case for lack of jurisdiction, "in the interest of justice" *to transfer* the case to a right court, that is, a court empowered by §2(a)(1) to adjudge persons bankrupt.

Section 32(b) of the Act is the only provision dealing with cases filed in the "wrong court of bankruptcy". The purpose of that provision is clear. It was intended to prevent the dismissal of all petitions filed in a "wrong court", as was required prior to the 1952 amendment. Under §32(b) the court is now also given the option "in the interest of justice" *to transfer* it to a proper court for adjudication.

Such transfer is permitted by the amendment to preserve, unimpaired, the trustee's right under §§60 and 67 of the Act (11 U. S. C. §§96 and 107) to set aside transfers made by the bankrupt within "four months" preceding the filing of the petition. The amendment uses the permissive "may" rather than a mandatory "must", because the option to transfer the wrongly filed petition, instead of dismissing the same, is to be exercised by the court only "in the interest of justice".

The language used in §32(b) is, therefore, clear on its face. It requires no subtle construction to make it conform with the jurisdictional requirements of §2(a)(1) of the Act.

Indeed, if the language of §32(b) is construed to mean that the "wrong court" may *retain* the petition wrongly filed and adjudicate thereon, not only does it conflict with the express requirements of §2(a)(1) of

the Act as to jurisdiction, but it can be reconciled with §2(a)(1) only by treating the 1952 amendment as an *implied recognition* that the jurisdictional provisions of §2(a)(1) have become simply a matter of venue. That is, in effect, an implied repeal of such jurisdictional requirements.

It is a "cardinal principle of construction" that a statute should be given such construction as will give all of its provisions their natural meaning and effect; and that a later statute or amendment is not to be construed to repeal an existing statutory provision, unless the two are "absolutely irreconcilable". *United States* v. *Great House,* 166 U. S. 601, 605 (1896); *Red Rock* v. *Henry,* 106 U. S. 596, 601 (1882); *Washington* v. *Miller,* 235 U. S. 422, 428 (1914); *United States* v. *Jackson,* 302 U. S. 628 (1937); *United States* v. *Borden Co.,* 308 U. S. 188, 198 (1939).

No such irreconcilable conflict exists here, if the language used by Congress is given its natural meaning.

Moreover, if it had been the intent of Congress, in 1952, for §32(b) to repeal the jurisdictional provisions of §2(a)(1), that would have been done directly, since in the same Act Congress gave its attention to the provisions of §2(a)(1) and added an amendment to its jurisdictional provisions to conform to the amendment adding §32(c) to the Bankruptcy Act.

Had Congress intended to permit a "wrong court" of bankruptcy to retain an improperly filed petition, instead of dismissing it, or "in the interest of justice" transferring it to a proper court for adjudica-

tion, §32(b) would have so stated, and, furthermore, §2(a)(1) would also have been amended to accord with such intention, as was done with respect to the provisions of §32(c).

It is therefore clear that a "wrong court of bankruptcy" has only been empowered by Congress to transfer a case to a right court, namely, a court with jurisdiction to make an adjudication. The alternative to such permissive transfer is dismissal for want of jurisdiction to adjudicate. The absence of express words conferring jurisdiction on the "wrong court" to retain and, if retained, then to adjudicate, cannot give rise to an implication of jurisdiction where none has been expressly conferred.

The only support for respondents' construction of §32(b) appears from the conclusions incorporated in the House and Senate Reports, as to the purported effect of §32(b). These are quoted in Respondents' brief (pp. 11-12).

That conclusion is not supported by the language of the amendment itself and, as we have shown, it conflicts with the simultaneous act of the same Congress, which amended §2(a)(1) to conform with the amendment adding §32(c) to the Act. Since the language of the Act itself seems plain and controlling, we submit that the conclusions in the Congressional Committee Reports cannot be relied upon to give the statute a different and broader meaning, since no inconsistency or ambiguity exists in the words of the statute itself.

As this Court said in *Caminetti* v. *United States*, 242 U. S. 470, 490 (1916):

> "But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

Similarly, in *Penna. R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184 (1912), this Court said (p. 199):

> "But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. *United States* v. *Freight Association*, 166 U. S. 290, 318; *Maxwell* v. *Dow*, 176 U. S. 581, 601."

There are many other authorities to the same effect. *Wisconsin R. R. Comm.* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 588 (1921); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1921); *United States* v. *Missouri Pacific R. Co.*,

278 U. S. 269, 278 (1928); *United States* v. *Shreveport Grain & El. Co.*, 287 U. S. 77, 83 (1932); *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89 (1935).

## POINT III

**The petition for a writ of certiorari should be granted.**

Dated: New York, N. Y.
July 14, 1955

Respectfully submitted,

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